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No. 84-787

In the

Supreme Court of the United States

OCTOBER TERM, 1984

GARO LAUDERBACK,

Petitioner,

vs.

AMERICAN BROADCASTING COMPANIES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DON H. REUBEN
REUBEN & PROCTOR
19 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5500

Of Counsel:
WILLIAM J. CAMPBELL, JR.
MARK SABLEMAN

Attorneys for Respondent
American Broadcasting Companies, Inc.

CHAS. P. YOUNG COMPANY

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QUESTION PRESENTED

Whether a broadcaster may report admittedly truthful facts concerning the activities of an insurance agent who made false representations to sell insurance to senior citizens, and then state its opinion, based upon such truthful facts, that such conduct is "rotten," "unethical," "unscrupulous" and a form of "white collar crime."

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SUPPLEMENTAL STATEMENT OF CASE

Petitioner's statement of the case omits relevant facts; we thus supplement Petitioner's statement.

A. State Investigations.

In late 1980 and early 1981 two Iowa state agencies began investigating insurance agents suspected of fraudulent sales practices toward the elderly. (Jt.App. 99-101, 108.)[1] Both government agencies conducted undercover investigations;

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[1] Record citations labeled "Jt.App." are to the Joint Designated Appendix in the Eighth Circuit. Record citations

(footnote continued on next page)

Respondent American Broadcasting Companies, Inc. ("ABC")[2] filmed one of these investigations at the invitation of the Iowa authorities. Lauderback was one of those under investigation and he was filmed by ABC making an insurance sales presentation to elderly persons in a "sting" operation conducted by the Emmet County, Iowa County Attorney's Office. (Jt.App. 150-151.)

B. Lauderback's False Sales Presentations.

During Lauderback's videotaped sales presentation to the elderly couple who acted as potential purchasers for the Emmet County Attorney, Lauderback made statements to sell insurance to this couple that he subsequently admitted below were false in fact. (Jt.App. 153-156, 194-196, 280-281, 197-98, 32.)

False Story About "Endorsement". Lauderback was videotaped claiming that the administrator of the largest local nursing home personally endorsed the nursing home insurance policy he was selling. Lauderback admitted in the trial court that the story was false. (Jt.App. 153.)

Lauderback conceded that he knew the representation was false when he made it, and that he knew his potential customers considered important the particular hospital administrator's endorsement of a specific insurance policy. (Jt.App. 153-156.)

Lauderback made other false statements on the ABC videotape:

> *False Assurances Regarding Regulations.* Lauderback assured the elderly couple that he knew Iowa insurance regulations. In fact, Lauderback admitted in the trial

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labeled "App." are to the Appendix to the Petition for Certiorari.

[2] ABC's only non-wholly owned subsidiary is Entertainment and Sports Programming Network (ESPN). (Sup. Ct. Rule 28.1)

court that he did *not* in fact know Iowa insurance law. (Jt.App. 313-315.) Lauderback also assured the couple that he could say with certainty that the particular policy he was selling would pay the cost for a certain nursing home while a competing policy would not. These statements about insurance coverage were also in fact false.[3]

False Statements Regarding Blue Cross and Blue Shield. Lauderback repeatedly and falsely claimed that the couple's present Blue Cross and Blue Shield policy would not pay for nursing home care. (Jt.App. 197-98.) It does. (Jt. App. 32.)

Failure To Disclose Premium Increase. Lauderback stated on the ABC tape that his policy was "guaranteed renewable for life," but did not disclose that the policy's premiums would increase with renewals—an unethical act by his own admission. (Jt.App. 194, 196, 280-281.)

False Statements In Prior Sale. On the videotape, Lauderback boasted concerning a prior sale of nursing home insurance he had made to an elderly woman; the Iowa authorities made inquiry concerning that prior sale. They discovered that Lauderback had made false statements of fact to the unsuspecting woman to accomplish the sale he had boasted about in the videotape. (Jt.App. 43-49, 113-117, 119-121, 123-127.)[4]

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[3] In fact, the regulations provide exactly the opposite from what Lauderback represented: all policies had to provide equivalent coverage, and coverage could never be determined in advance but depended on the individual, not the institution. Iowa Admin. Code § 510.14.93.

[4] Lauderback falsely told this elderly customer that the policy she had would not cover at Estherville, Iowa's largest local nursing home, and failed to disclose the age limit for the policy he was selling. The customer's application for insurance was turned down as a result of the age limit, and she was left

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C. Investigations of Lauderback.

The Iowa Insurance Department investigated Lauderback because of the statements he made during his videotaped sales presentation. In August 1981 (shortly after the broadcast), the Iowa Insurance Department filed a proceeding against Lauderback to revoke his insurance license. (Jt.App. 31-33.)

Also, the Emmet County Attorney conducted a criminal investigation of Lauderback. The County Attorney determined that Lauderback's conduct as recorded in the videotaped sales presentation was fraudulent; however, because no sale had in fact occurred, the County Attorney determined that he could not charge criminal fraud. (Jt.App. 111, 123.)

However, the County Attorney was at the time of the broadcast considering prosecuting Lauderback for his sale to the elderly woman that Lauderback described on the videotape. This matter was pending at the time of the ABC broadcast. (Jt.App. 120-121, 123-127, 129, 133-134, 67.)

D. ABC's Knowledge.

Immediately prior to its broadcast, ABC knew that the state of Iowa was processing a proceeding to revoke Lauderback's insurance license and that the county attorney was considering criminal prosecution for the sale actually made. (Jt.App. 138.)

E. The ABC Broadcast.

The broadcast in issue on "The ABC News-Magazine 20/20" on May 14, 1981 concerned insurance fraud against the elderly and reported upon Lauderback's conduct while under investigation and the ensuing charges against him. (App. 26-36.) Lauderback was one of seven insurance agents reported in the broadcast as imposing on the elderly; the program specifically described or portrayed the activities of

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uninsured. Lauderback admitted that such conduct is unethical. (Jt.App. 205-205, 264-265, 195-196.)

six agents as well as Lauderback, and reported generally about investigations of sixteen agents. Moderator Hugh Downs introduced the broadcast by describing what was to be depicted as "unscrupulous insurance salesmen cheating the elderly." (App. 26.)

As to Lauderback, the broadcast showed his false endorsement story during the "sting" (App. 33, middle of page), followed by the denial of any such endorsement. (App. 33.) Following this, the narrator described what had happened to each of the several agents filmed in the Emmet County investigation. When the television screen showed Lauderback's photograph, the narrator said: "Mr. Lauderback is currently under a formal investigation." (App. 34.) The screen immediately changed again as the narrator spoke of "this kind of unethical—sometimes illegal—conduct" and then went on to an interview with Iowa's Insurance Commissioner and other aspects of the insurance fraud problem. (App. 34.) There was no further mention of Lauderback in the broadcast.

F. Lauderback's Complaint.

Lauderback did not complain of the words that were said specifically about him. He did not contend in his Complaint or deposition that the sentence "Mr. Lauderback is currently under a formal investigation" was false. (Jt.App. 8-17, 216-221.) Nor did he dispute that his endorsement story as shown on the tape was false, or that the nursing home administrator's denial was properly portrayed. (Jt.App. 152-156.)

Rather, Lauderback complained of language in the broadcast that condemns the practices of unethical insurance salesmen preying on senior citizens. In his brief below, he contended that these words "impute specific criminal or other wrongful acts to Garo Lauderback." (Pl. Supp. Br. at 7.)

G. ABC's Summary Judgment Motion.

ABC moved for summary judgment on two grounds: (1) all the statements of fact made about Lauderback were true and

other statements were protected as opinion, and (2) the broadcast was privileged as a report of an official government investigation. The Eighth Circuit and the District Court considered only these two issues. (App. 8.) The "actual malice" doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) *was never raised by ABC in either court below and has never been in issue here. But see* Lauderback's Pet. for Certiorari 5, 6-7, 9-10, 11-12, 12-13.

ARGUMENT AGAINST ALLOWANCE OF WRIT

THE EIGHTH CIRCUIT APPLIED THE PROPER LEGAL STANDARD.

We believe this case presents no issue worthy for consideration by this Court. There is no first amendment or other constitutional question raised, there is no novel or significant question of law presented, there is no claim of a conflict in the circuits, nor is there any departure from established law by the Court below, or indeed any other grounds for granting certiorari. Rather this case is simply a garden variety application of the hornbook law of comment that is so well established it is codified in the Restatement. Restatement (Second) of Torts § 566 (1977).

Moreover, the Eighth Circuit in its decision applied the well and long recognized legal standards for determining whether challenged language is fact or comment. The Court examined the language in context and as a whole to determine whether the words were fact or comment:

> We find that the *impression left by the broadcast*, that Lauderback was dealing unscrupulously with senior citizens, is more analogous to a broad, unfocused, wholly subjective comment than it is to specific accusations of felonious conduct. We conclude that *a reasonable viewer* of the 20/20 broadcast would have recognized that *inferences raised* about Lauderback's honesty or about the truthfulness of his statements were opinions and not legal conclusions. . . . We conclude that *the broadcast as a whole* may have *indicated* that ABC believed Lauderback

> to be guilty of unethical behavior. However, any representation of such was understandable as opinion and not fact.

App. 14 (emphasis added, footnote omitted).[5]

This is the traditional approach in any comment case, and language far harsher than that in issue here has been held protected using such an analysis. *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6 (1970) ("blackmail"); *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974) ("traitor"); *Orr* v. *Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978) ("swindle" and "fraud"); *Lewis* v. *Time Inc.*, 710 F.2d 549, 554-56 (9th Cir. 1983) (statement that lawyer was dishonest); *Bennett* v. *Transamerican Press*, 298 F.Supp. 1013, 1015 (S.D. Iowa 1969) ("greed", "lust for money" and officials' "panting, sweating grasp for money"); *National Rifle Ass'n* v. *Dayton Newspapers, Inc.*, 555 F.Supp. 1299, 1309 (S.D. Ohio 1983) ("murders and robberies the NRA so happily encourages"); *Thuma* v. *Hearst Corp.*, 340 F.Supp. 867, 871 (D.Md. 1972) ("coldblooded murder"); *Stuart* v. *Gambling Times, Inc.*, 534 F.Supp. 170 (D.N J. 1982) ("number one fraud"); *Foote* v. *Sarafyan*, 432 So.2d 877, 880 (La.App. 1982) (opinion that plaintiff committed crime of payroll fraud held nonactionable; "This is not a case of a naked allegation of crime but of publication of the underlying facts with substantial accuracy coupled with publication of the harsh opinion whose merit readers might decide for themselves"). These cases also make clear that there can be no *per se* rule, such as that urged by Petitioner, in which any use of words that might be used in the criminal law would necessarily be considered a statement of fact. (Pet. 17-20.) Instead the words in question must be considered in context and taken as a whole, precisely as the Eighth Circuit did below. *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970) (word "blackmail" in

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[5]The emphasized words and phrases show that the Eighth Circuit viewed the broadcast carefully, in context, in determining whether a reasonable viewer would understand the statements in issue as fact or opinion.

context held to be "no more than rhetorical hyperbole, a vigorous epithet . . .").

The Court also determined that there was in the language no inference of undisclosed defamatory facts on the ABC broadcast:

> In the instant case, the factual bases for the inferences raised about Lauderback were revealed. The videotape of Lauderback, the interview of the nursing home director, and the statement by the Insurance Commissioner regarding the sale of insurance to the elderly, in general, formed the bases of the opinions in the broadcast. No undisclosed facts existed which were necessary for the viewers to be able to independently evaluate the opinions expressed.

App. 15. *See Orr* v. *Argus-Press Co.*, 586 F.2d 1106, 1115 (6th Cir. 1978) (reporter "accurately reported the underlying facts" that were the basis for his comments); *Stuart* v. *Gambling Times Inc.*, 534 F.Supp. 170, 173 (D.N.J. 1982) (article was supported by facts upon which the writer based his opinions); *Iverson* v. *Crow*, 639 S.W.2d 118, 120 (Mo.App. 1982) ("Respondent does state facts upon which he bases his opinion. . . . Whether the opinion expressed by the author is justified by the facts stated is for the reader of the news article to decide"); *Howell* v. *Blecharczyck*, 119 Ill.App.3d 987, 457 N.E.2d 494 (1983) ("even if stated opinion is based on disclosed facts carefully and seriously selected to support the opinion, such admittedly 'biased' journalism is afforded the same constitutional protection as writing thought of as 'balanced' ").

In sum, the Eighth Circuit simply applied existing libel comment law to the instant publication and found it to be comment and therefore non-actionable. There is nothing either in the circumstances of the publication, its context, the Court's ruling or the state of the law that even remotely commends this case for a review by this Court.

Finally, the Court did not commit any of the "errors" plaintiff asserts in his Petition:

First, the Eighth Circuit *never* "confused" comment principles "with the constitutional actual malice privilege," as Petitioner contends. (Pet. 5-7.) That issue never arose.

Second, the comment privilege was correctly applied to the ABC broadcast by the Court below. ABC disclosed the facts on which its comment was based and then commented; it was not required to disclose all the facts Petitioner wanted disclosed. *See* pp. 7-8 *supra*. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas"). Such a rule of law urged by Petitioner is clearly unworkable and would emasculate the secured right to comment.

Third, the Eighth Circuit did *not* make a *per se* rule that all media investigations must be assumed to have disclosed all the underlying facts, as Petitioner contends. (Pet. 8.) Nothing in the Eighth Circuit's decision supports Petitioner's claim, and Petitioner is misreading the opinion in a transparent effort to create some semblance for review here. *See* App. 11, 15 (discussing facts ABC disclosed about Lauderback).

Fourth, the Eighth Circuit properly found the case appropriate for summary judgment. Petitioner's contention that there were jury issues on whether ABC was "negligent" is unfounded. (Pet. 9-10.) ABC's "negligence" was never in issue in the District Court or the Eighth Circuit. The legal issues raised by ABC were that the language was opinion as a matter of law, an exercise of official report privilege, and truthful as a matter of law. All of the cases Petitioner cites concerning triable jury issues involve disputed facts and there is no material issue between the parties as to the relevant and decisional facts here. (Pet. 10-15.)

CONCLUSION

The Eighth Circuit decision is a straight-forward application of established principles of libel law. The decision below presents no conflict in the circuits, departure from existing law, or issue of special importance. For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

DON H. REUBEN
REUBEN & PROCTOR
19 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5500

Of Counsel:
WILLIAM J. CAMPBELL, JR.
MARK SABLEMAN

Attorneys for Respondent
American Broadcasting Companies, Inc.